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IN THE
Supreme Court of the United States

October Term, 1948.

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,
vs.

**FEDERAL POWER COMMISSION, MONTAKOTA
GAS COMPANY, SOUTH DAKOTA PUBLIC UTILI-
TIES COMMISSION and NORTH DAKOTA PUBLIC
SERVICE COMMISSION.**

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

PETITION

Montana-Dakota Utilities Co., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case August 4, 1948, affirming orders of the Federal Power Commission.

STATEMENT AS TO JURISDICTION

The statutory provisions believed to sustain the jurisdiction of this Court are Section 19(b) of the Natural Gas Act, Act of June 21, 1938, Chapter 556, Sec. 19(b), 52 Stat. 831 and 28 U. S. C., Sec. 2101(c).

QUESTIONS PRESENTED

1. Does the Federal Power Commission have jurisdiction under the Natural Gas Act (52 Stat. 821, 15 U. S. C., Sec. 717-717w) to prescribe a system-wide rate on petitioner's natural gas pipe-line system for the common carrier transportation of natural gas, when it appears that the only rates previously in effect covered shipments through only one of petitioner's pipe lines, namely, its Black Hills line, and were not applicable to the transportation of natural gas in any other pipe line of petitioner's sytem to points in North Dakota or Montana?

2. Does the Commission have the power to prescribe a rate schedule which requires more than common carrier service, and in fact requires that petitioner deliver gas to a Shipper's customers in accordance with the needs of the customers regardless of the movement of Shipper's gas in the pipe line?

3. Can a common carrier pipe line company as to which no specific obligations have been imposed discharge its common carrier obligation by nondiscriminatory purchase of gas in the field in accordance with this court's definition of common carriers in *U. S. v. Ohio Oil Company*, 234 U. S. 548?

STATEMENT

In so far as these proceedings are concerned, Montana-Dakota Utilities Co., the petitioner, is a public utility company engaged in the production, transportation in interstate commerce and sale of natural gas to consumers. It produces gas in the Baker-Glendive Field in eastern Montana and western North Dakota from which pipe lines extent to Glendive, Montana, and Williston, North Dakota, to Bismarck, North Dakota, to the Black Hills District of South Dakota and to Miles City, Mon-

tana. It also produces gas in the Bowdoin Field situated in Valley and Phillips Counties, Montana. In 1940 a pipe line was constructed from the Bowdoin Field to a point of connection with the line extending from Glendive, Montana, to Williston, North Dakota, so that from 1940 the two fields have been interconnected although gas produced in the Bowdoin Field has never been transported south from the Baker-Glendive Field through the Black Hills line to the Black Hills district of South Dakota (R. 182-184). A map of the system was introduced in evidence as Exhibit A. A copy of this exhibit, reduced in size, is attached as an appendix to this petition and brief.

Certain of petitioner's pipe lines cross government lands under rights-of-way granted by the Secretary of Interior under the Leasing Act of 1920 as amended (41 Stat. 449; 49 Stat. 678; 30 U. S. C., Sec. 185). (Petitioner's pipe line from its Cabin Creek compressor station to Bismarck, North Dakota, crosses no government land.) Section 28 of the Leasing Act as amended provides:

"Rights-of-way through the public land, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the

Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable," etc. (49 Stat. 678; Title 30 U. S. C., Sec. 185).

The Natural Gas Act does not make any pipe line a common carrier nor does it delegate any power to the Federal Power Commission to require that a pipe line company shall carry gas for others. It gives to the Federal Power Commission only regulatory power over rates by authorizing the Commission to hold hearings and to substitute for an unfair, unjust or discriminatory rate one which is just, reasonable and nondiscriminatory (Natural Gas Act, Sec. 5(a), 52 Stat. 821, 15 U. S. C., Sec. 717 (d)).

On October 27, 1933, and on March 2, 1937, Montana-Dakota Utilities Co. promulgated two rate schedules for the transportation of natural gas from the Baker compressor station in the Baker-Glendive Field to the Black Hills district in South Dakota. (Exhibits 20 and 17, R. 595, 577). These schedules were given to Montana Eastern Pipe Line Company, a corporation, on demand of John Wight who was then associated with that company (R. 192-193), but no gas was offered for shipment under either schedule. No other rate schedules were ever in effect on any part of petitioner's pipe-line system.

Without any prior demand or without having furnished information to petitioner as to any amount of gas to be shipped, the points of origin or destination, the amount of space in petitioner's pipe line which would be taken from petitioner and used by the Shipper, Montana Development Company (a predecessor of Montana Gas Company) instituted a proceeding before the Federal Power Commission alleging that it had prospective customers for gas in North Dakota and South Dakota, alleging that the rate schedules of petitioner were

unjust, unreasonable and discriminatory and requesting the Commission to fix just and reasonable rates.

By its orders the Federal Power Commission has purported to prescribe a rate schedule applicable not only to the line extending from petitioner's Baker compressor station to the Black Hills but applying to petitioner's entire system.

Moreover, this order requires petitioner to perform a function beyond that performed by any common carrier. It requires the petitioner to deliver gas to the Shipper's customers in exactly the same manner as it presently delivers gas to its own customers regardless of the movement of the Shipper's gas in the pipe line. The Commission's order provides:

"The transportation service rendered shall, in all ways, be equal to the firm deliveries made by the Company for itself or for others. During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

This is not a requirement that petitioner give common carrier service, but it is a requirement that petitioner make deliveries regardless of the movement of Shipper's gas and on the same basis that regular public utility deliveries to customers are made.

Petitioner contends that the only power delegated to the Federal Power Commission under the Natural Gas Act, which Act is admittedly the only source of power of the Federal Power Commission in this proceeding, is the power delegated to it under Section 5(a) of the Natural Gas Act to substitute a just, reasonable and nondiscriminatory rate for a rate found by it to be unreasonable, unjust or discriminatory. Petitioner contends that the Federal Power Commission does not in this case have

the power to fix a system-wide rate, that is, to initiate rates on petitioner's system over most of which rates have never previously been in effect.

The Court of Appeals in its opinion Record, Vol. IV, page 17), states that the Commission found petitioner's former rate schedules to be unduly discriminatory "in that they are greater than the rate charged for gas (i.e., the cost of the gas plus all transportation costs), delivered to petitioner's own industrial customers, each of whom is served directly from transmission lines." The Court then states:

"Under these circumstances, no feasible plan is suggested to eliminate discrimination, and it does not appear that any effective regulatory rate order could be entered to achieve that result, without including the entire system" (Record, Vol. IV, page 18).

The Court's conclusion is an obvious non sequitur. Assuming that petitioner's transportation rates are discriminatory because they are higher than certain of petitioner's sale prices for gas, such discrimination can be readily removed by lowering the transportation rate. Such discrimination furnishes no justification for the action of the Commission in purporting to fix a rate applying to the entire pipe-line system, over most of which no rate had ever before been in existence.

There is no legal basis on which the Commission or the courts can justify the action of the Commission in requiring that petitioner give continuous and uninterrupted deliveries to a Shipper's customers regardless of the movement of the Shipper's gas in petitioner's pipe line. Neither the Commission in its brief in the United States Circuit Court of Appeals, nor the court have attempted to explain the source of the Commission's power to impose such a requirement or to justify the Commission's action in imposing this requirement in its order.

Petitioner is a common carrier only by reason of the Leasing Act (49 Stat. 678; Title 30 U. S. C., Sec. 185), which imposes no requirement that rates be established or published. It must be assumed that congress used the term "common carrier" as that term was understood and used by this court in *U. S. v. Ohio Oil Company*, 234 U. S. 548, in which this court has held that oil pipe lines carrying gas purchased in the field by the Company were common carriers. By failing to require that the Company must establish and publish tariffs for transportation, Congress must have intended, and the language of the Leasing Act provision is indicative of such intention, that petitioner could fulfill its common carrier function by a nondiscriminatory purchase of gas produced in the vicinity of its pipe line. Under Unit Plans of Development adopted under supervision of the Secretary of Interior and effective in the entire area in which natural gas transported through petitioner's pipe lines is produced, petitioner has purchased all gas produced and offered for sale to it on a nondiscriminatory basis and at rates approved by the Department of Interior.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the order of the Commission and the judgment of the court below operate to take from petitioner the right to initiate rates for a common carrier transportation of gas in its pipe lines, other than its Black Hills line, in conflict with the prior decision of this Court in *I. C. C. v. Cincinnati N. O. & T. P. R. Co.*, 167 U. S. 479, and other cases. Apparently both the Commission and the court below concede that the Commission has no original rate making power, but that result, namely, the initiation of rates by the Commission, is accomplished under the order by indirection and through enlargement of the powers granted to the Com-

mission. The Commission resorts to the device of assuming that discrimination exists because petitioner's transportation rates in effect on its Black Hills line are higher than petitioner's sale prices on other parts of its system and by assuming that such discrimination can be remedied only by fixing lower transportation rates on the entire system when obviously such discrimination could be completely and effectually removed by lowering the transportation rates on the part of the system to which they applied, namely, the Black Hills line, leaving to petitioner the unimpaired right to initiate rates on other parts of the system upon reasonable demand for such rates.

This case is the first case to involve the power of the Federal Power Commission to fix rates under the Natural Gas Act for the interstate transportation of natural gas. As stated by the court below:

"The whole record here reflects the existence of a dispute and controversy involving not only factual questions but also questions of law which ought to be determined for the future guidance of the petitioner and the Commission."

Inasmuch as Section 5 (a) of the Natural Gas Act (Title 15 U. S. C., Sec. 717 (d)) is the only grant of power to the Federal Power Commission to fix rates for the interstate transportation of natural gas and such power is merely a revisionary power, it becomes a matter of public interest, for the determination of this Court, whether the Commission can make an order applying to lines over which no rates have ever been in effect merely because the Commission has found that former transportation rates on other parts of the system exceeded sale prices. Viewed in its broader aspects, the question is whether the Commission can justify an order on the basis that it is for the purpose of removing discrimination when such discrimination could be effectively and completely removed

without the taking of any such action. The matter is, therefore, an important question of Federal law which has not been and should be settled by this Court.

This case likewise presents for the first time the question whether a common carrier of natural gas must deliver to the Shipper or his customers as the gas is needed at the delivery end of the pipe line regardless of the movement of gas in the line. Such requirement is entirely novel so far as common carriers are concerned. It is therefore a matter of public interest for a determination of this court whether the Commission has the power to impose such an obligation upon a common carrier pipe line.

It likewise is a matter of public interest whether a common carrier pipe line as to which no specific duties have been imposed, can discharge its duties by nondiscriminatory purchases of gas, thereby being a common carrier within the definition of a common carrier laid down by this court in *U. S. v. Ohio Oil Company*, 234 U. S. 548.

BRIEF IN SUPPORT OF PETITION OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not officially reported.

JURISDICTION, QUESTIONS PRESENTED, ETC.

A statement of the jurisdiction of this Court, the questions presented, the statement of the case and the reasons for granting the writ are set out in the petition.

ARGUMENT

The Commission Exceeded Its Power in Prescribing a System-wide Rate.

The Federal Power Commission has no power to prescribe rates for the common carriage of natural gas in petitioner's pipe line except as the power is derived from Section 5(a) of the Natural Gas Act which provides:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

In the exercise of the powers thus conferred upon it the Commission could not prescribe new rates; it can only substitute a just, reasonable and nondiscriminatory rate for one found to be unjust, unreasonable or discriminatory. It is not given the power to take from a utility its inherent right to initiate new rates.

In this case the only rate schedules at any time in effect were petitioner's rate schedules F. P. C. No. 3-G and F. P. C. No. 4-G, each of which applied only to the Black Hills line extending from the Baker compressor station to the Black Hills. No rates were ever in effect on the line from the Cabin Creek Compressor station to Miles City, the line from the Cabin Creek station to Glendive, Montana, and Williston, North Dakota, the line from the Cabin Creek station to Bismarck, North Dakota or any line extending out of Bowdoin Field. Nevertheless, the Commission has purported to fix a new rate applicable on the entire system including those referred to over which no rates had previously been in effect.

Since no legislative power has been delegated to the Commission to fix such system-wide rates where none previously existed, the Commission's rate order can be valid only if the power delegated to the Commission could not otherwise be carried out. If the vice found to exist in the rates applicable to the Black Hills line could be remedied by a new rate schedule applicable only to the line, obviously the Commission has no power by an order to fix rates encompassing the entire system.

The fact is that the only justification urged for the Commission's order is that the rates on the Black Hills line were discriminatory because they were higher than industrial sales contracts applicable to various customers on other parts of petitioner's system. If a rate is improper because it is too high, the impropriety can be removed by lowering it. The so-called discrimination found by the Commission and which is referred to by the court below as justification for the Commission's order (Record, Vol. IV, page 17) was due only to the fact that the rates in existence were too high. Such discrimination could have been fully and completely removed by reducing the rate on the Black Hills line. Therefore, the Com-

mission was entirely without power to fix a rate applicable to the entire system.

This Court has held that the power to prescribe rates must be specifically conferred and is not to be implied. In *I. C. C. v. Cincinnati N. O. & T. P. R. Co.*, 167 U. S. 479, the Court said:

"We have, therefore, these considerations presented: First, the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function. * * * Second, that Congress has transferred such a power to an administrative body is not to be presumed or implied from any doubtful or uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third, incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future" (pages 505, 506).

It is therefore apparent that the order is not an exercise of power granted the Commission but is wholly in excess of its power and is therefore invalid and void.

The Order of the Commission Is Invalid Because It Purports to Place Upon Petitioner Obligations in Excess of Those Enjoined by Law Upon Common Carriers.

In its order of March 22, 1946, the Commission orders that:

"(B) Montana-Dakota Utilities Co. file, on or before June 1, 1946, a new rate schedule for the common carrier transportation of natural gas in in-

terstate commerce, reflecting the rates and charges set forth in 'Exhibit A,' appended hereto and made a part hereof, and providing substantially the terms and conditions outlined therein" (R. 140, 141).

Exhibit A, which is made a part of the order, contains the following requirement for Character of Service:

"The transportation service rendered shall, in all ways, be equal to the firm deliveries made by the Company for itself or for others. During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

Exhibit A also contains the following provision under the heading "Applicability":

"Transportation of natural gas, as used in this rate schedule includes actual transportation of gas from point to point and receipt of gas at one point and delivery of a like amount of gas at another point (after making allowance for line losses and adjustment for variations in heat content of gas) without regard for the fact that such delivery may have been accomplished by exchange or displacement" (R. 142).

Under the heading "Company's Obligation to Deliver Gas" Exhibit A provides:

"The Company has no obligation to make deliveries beyond the amount of gas received from Shipper for transportation" (R. 145).

The effect of the order is not to require petitioner to accept natural gas for transportation and to transport it as a common carrier, but to require petitioner to furnish to a Shipper's customers uninterrupted deliveries of gas not as a common carrier function but as a public utility service. Power to impose such requirement has not been delegated to the Commission.

Petitioner has constructed its system as a natural gas public utility (R. 181). As such it has undertaken to provide a system adequate to produce, transport and distribute to its customers natural gas at all times in the quantities needed by the customers. This is not common carrier service. It is a service peculiar to a natural gas public utility.

No common carrier is operated on such a basis. The Interstate Commerce Commission cannot order a railroad to provide continuous, uninterrupted deliveries of grain to a mill, in the quantities required by the mill from day to day, provided only that the shipper has in the hands of the railroad at some point on its lines grain in an amount at least equivalent to the deliveries. A railroad or other common carrier is required to deliver only when the goods actually reach the point of destination.

The Federal Power Commission does not require that petitioner shall deliver in accordance with the specific or normal movement of gas in the pipe line. Its order requires petitioner to deliver gas to the Shipper's customer at any point on its system even though none of the Shipper's gas could be physically available at the place of delivery. Since deliveries are determined by the needs of the user rather than the movement of the Shipper's gas the order requires petitioner to store the Shipper's gas in its line if the Shipper's customer is not ready to take the gas when it reaches its destination. This is not the kind of common carrier transportation furnished by any other common carrier. What statutory authorization does the Commission purport to act upon in the making of the order?

The fact is that the Commission's order is not an order for common carrier transportation. It is an order requiring petitioner to engage in a new form of public utility business. Under the order petitioner must accept gas from the Shipper at its compressor station. It must de-

liver gas to the Shipper's customers as they want it, whether the Shipper's gas has reached the customers or not. It is in effect an order requiring petitioner to buy from a Shipper, and to sell to the Shipper at preferential rates wherever the gas is needed by the Shipper's customers.

The Commission's order recognizes the problem every gas pipe line faces in cases of breakage or on peak days—namely, the necessity of discriminating between domestic customers and other customers, and the Commission to quote its order says the solution to that problem is:

"During periods when service to any of the Company's customers is limited in any part of the system for lack of capacity to serve, Shipper's consumers in a like classification and on the same part of the system may be limited to the same extent as are those of the Company" (R. 142).

But the Commission's solution is not a solution and is beyond the power of the Commission to prescribe.

In order to proceed in accordance with the solution proposed by the Commission, petitioner must know the classifications of service which the Shipper affords to its customers. It must know the needs of the Shipper's customers. Only with this knowledge can petitioner operate its line during peak periods. This point can be illustrated by considering petitioner's responsibility to deliver gas to a Shipper's branch line which might serve five customers, three of which may be industries, the other two a school and a hospital. Petitioner can reduce the deliveries to the extent of the needs of the industries but it must deliver gas to provide for the needs of the other customers. It must, therefore, have complete and up-to-date information concerning the needs of the individual customers of the Shipper.

In its requirement that petitioner render transportation service equal to firm deliveries to its own customers,

the order places an impossible and wholly unauthorized burden upon petitioner. As a practical matter, it could not reasonably keep itself sufficiently informed concerning operations of a Shipper in any way without carrying on two or more separate public utility operations. In this connection it is of interest to note that the rate order affords no compensation to petitioner for the additional activities which it would be required to carry on. The rate prescribed by the Commission's order contemplates no expense on petitioner's part other than the expense heretofore incurred in the transportation of its own gas (R. 140).

Where, with respect to other carriers, a regulatory body is given power to fix rates, such power is derived from a specific legislative delegation of power. No such power has been delegated to the Federal Power Commission.

Petitioner submits that the Commission was without power to enter the order and that the order of March 22, 1946, and the order of January 29, 1947, which purports to confirm it are void and unenforceable and should be wholly set aside, and that the order of the court below should be reversed."

The Order of the Commission Is Void Because Petitioner Was Performing Its Obligation Under the Leasing Act by Nondiscriminatory Purchases of Gas in the Area Served by Its Pipe Lines.

The only obligation imposed upon petitioner which can be the basis for any order of the Federal Power Commission is embodied in Section 28 of the Leasing Act as amended on August 21, 1935, which provides:

"Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural

gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable," etc. (Title 30, U. S. C., Sec. 185).

The intent of Congress in enacting this section was to provide a market for gas and oil produced on Government land. Congress was not undertaking to provide transportation for the public at large but was protecting the public domain.

In undertaking to place a common carrier obligation upon the holder of a right-of-way across the public domain, Congress was using the term common carrier as that term was then applied in the case of pipe line companies. Many years prior to the enactment of Section 28 the Supreme Court stated that a common purchaser of oil which is later transported through its pipe line to its refinery was a common carrier. In effect it held that the purchasing of oil prior to shipment and the shipment thereof was a common carrier function.

In *U. S. v. Ohio Oil Company*, 234 U. S. 548, 58 L. Ed. 1459, the Court held that the provisions of the Interstate Commerce Act as amended were applicable to oil pipe lines which purchased oil from producers in the field and transported such oil through their pipe lines even though title to all oil entering the pipe was in the pipe line company.

The amendment to the Interstate Commerce Act provided:

"That the provisions of this Act shall apply to any corporation or any other person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe line or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act."

(Act of June 29, 1906, Ch. 3591, 34 Stat. L. 584).

In holding that the pipe line companies engaged in operations above described were common carriers, Mr. Justice Holmes, in the opinion among other things, stated:

"They carry everybody's oil to a market although they compel outsiders to sell it before taking it into their pipe lines."

The Court held that the common purchaser was a common carrier. To the same effect see *Champlin Refining Company v. U. S. A. and I. C. C.* (329 U. S. 29); *Valvoline Oil Company v. U. S. A. and I. C. C.*, 308 U. S. 141.

Since purchasing in the field and shipment thereof constitutes common carriage, it necessarily follows that a common carrier obligation imposed without specific expression of the manner in which the obligation shall be discharged may be discharged by carriage after purchase as in the Ohio Oil Company case.

Section 28 of the Leasing Act itself supports this construction. In effect it requires that the line shall be operated as a common carrier and in defining the manner of discharging the obligation, it provides that the pipe line companies shall convey or purchase without discrimination oil or natural gas produced from government land in the vicinity of the pipe line, etc.

All of the natural gas transported through defendant's pipe lines is produced under Unit Plans of Development, the operation of which is under the supervision of the Secretary of the Interior (R. 183, 184, 185). Through the operation of the Plan the cost of production and maintenance and the proceeds of gas produced are allocated among the owners of the land in the area on an acreage basis (R. 185). Petitioner is therefore discharging its obligation through such purchase and no other obligation is placed upon it.

Under any other construction it would appear to us that Section 28 of the Leasing Act is so vague as to be wholly meaningless and unenforceable. Long prior to the enactment of the Leasing Act Congress was aware of the necessity for specific and detailed provisions governing common carriers. It cannot be assumed that with such a background Congress through a mere provision that pipe line companies "shall be constructed, operated and maintained as common carriers" intended to make pipe line companies common carriers without any provision as to the manner in which their obligations should be discharged. The common carrier provision is merely a part of the obligation placed by Section 28 upon the pipe line company. Construed together with the other language of that section it requires the pipe line company to discharge its common carrier obligations either through purchase or transportation. In petitioner's case its obligation can be discharged only by purchase since all of its gas is produced in fields under the Unit Plan. It could not without discrimination purchase some of that gas and transport the balance. All the gas must be treated in the same manner.

At the time of the amendment of the Leasing Act Congress had under consideration legislation to declare pipe line companies common carriers. Title 3 of the Wheeler-Rayburn Bill contained a provision to that ef-

fect. At the time of passage of that bill five days following the amendment of Section 28 of the Leasing Act in 1935, the provision to make pipe line companies common carriers was eliminated from the bill. It must be assumed that Congress knew the difficulties attendant upon the operation of a natural gas pipe line company as a common carrier and eliminated the the common carrier provision of the Wheeler-Rayburn Bill for that reason, having already protected the public domain by the enactment of Section 28 of the Leasing Act, under which a market was provided for all gas produced on the public domain.

Petitioner submits that its obligation is being discharged through its operation as a common purchaser under the Leasing Act and that it is not obligated under the Leasing Act or any other statutory provision to transport natural gas as a common carrier so long as it is acting as a common purchaser. The orders of the Federal Power Commission are therefore invalid and void and should be set aside, and the order of the Court below should be reversed.

We respectfully submit that the petition should be granted.

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IN THE
Supreme Court of the United States
AT WASHINGTON, D. C.
MONTANA POWER COMMISSION, Petitioner,
v.
FEDERAL POWER COMMISSION, Respondent.

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petitioner to establish rates. It further asserts that since petitioner has persistently refused to perform its duty, the Commission could itself establish the rate (Federal Power Commission brief, 11, 12). This is of course a complete disregard for the due processes of law.

If under Section 4 (c) the Commission assumed that it had the right to order petitioner to fix rates, it should have done so, rather than arbitrarily undertaking to fix a rate itself. Petitioner could then have requested review of such order to determine whether, in the absence of a reasonable request for service, it must fix rates. If the Commission's order were found to be valid petitioner could then itself establish such rates. The Commission could not arrogate to itself the right to fix such rates merely because petitioner in the absence of reasonable request had not done so. The Commission has overlooked the fact that under our system of laws even a known criminal has the right to insist upon the due processes of law.

Section 4 (c) of the Natural Gas Act¹ contains nothing more than a requirement that a natural gas company file with the Commission schedules showing such rates classifications, practices, regulations and contracts affecting them, as it has in force. It is not a requirement that a company fix rates for every type of service which it conceivably could render, which if rendered would be subject to the jurisdiction of the Commission. Petitioner

¹Sec. 4 (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date of this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. (Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, et seq.)

is not in default under this section, and the Commission is not by this section given any rate-making power.

Congress could not have intended by Section 4 (c) to require a company to fix and establish rates for all types of service which it conceivably could render. The language of the section proves this. Congress is not so inept in the use of language that, had it intended to make such a requirement it would have phrased the requirement in such meaningless terms. A comparison of Section 4 (c) with Section 16 (a) of Part II of the Interstate Commerce Act,² establishes the fact that when Congress intends to place upon a carrier the obligation to make and establish rates for service it does so in clear and unmistakeable terms. It does not do so merely by imposing upon the carrier a requirement that it file with the Commission and keep open for inspection all schedules, and contracts affecting them.

The Commission's present argument can be tested by its past statements in this proceeding. These show that it did not previously contend that under Section 4 (c) petitioner must, prior to request therefor, establish rates for any and all transportation which it conceivably could render to a shipper.

²Sec. 16 (a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable divisions of joint fares. It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in cases of joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. (Interstate Commerce Act, Part II, 49 Stat. 558, 52 Stat. 1240, 54 Stat. 924, 49 U. S. C. 316.)

In its opinion which is a part of its order of March 22, 1946, it thus characterized the issues in this proceeding:

"As we conceive the substantive issue presented for our determination, the only question is whether rates for the common carrier transportation of natural gas through respondent's Baker-Bowdoin system, established pursuant to the provisions of the Leasing Act of 1920, as amended, and filed with this Commission, are just and reasonable" (R. I, 120).

In its order of March 22, 1946, the Commission prescribed only rates for transportation on a firm delivery basis. In the concluding paragraph of its prescribed rate schedule it states:

"Under the conditions discussed herein, the company may provide rates for common-carrier transportation service on a firm delivery basis for distances less than thirty-five (35) miles and more than three hundred (300) miles. *Moreover, upon application the company shall*, if it has adequate facilities, provide rates for transportation on an interruptable or off-peak basis" (R. I, 145). (Italics supplied.)

If petitioner under Section 4 (c) of the Natural Gas Act is required to establish and file its rates for all types of transportation service which it conceivably could render, although no request for rates has been made, petitioner will have failed to discharge its obligation even though it accepts the rate prescribed by the Commission. How, under its present argument, can the Commission reconcile its provision that the company's duty to provide rates for off-peak deliveries, is to be "*upon application*"?

The Commission obviously has either gone entirely too far, or it has not gone far enough. If Section 4 (c) has the meaning that the Commission now ascribes to it petitioner will never know when it ceases to be delinquent in the discharge of the obligation placed upon it. There no

doubt will always be some form of service which it could give, which it has not been asked to give, and for which it has established no rates.

The obvious conclusion is that Section 4 (c) imposes only a requirement for filing existing schedules and contracts. The Commission's only rate-making power comes from Section 5 (a)² of the Natural Gas Act, which gives it no power to fix rates on a line where no rates previously existed and where no request for rates has ever been made.

We therefore respectfully renew our request for the issuance of a writ of certiorari to the Court of Appeals for the Eighth Circuit.

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²Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. (Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, et seq.)



FILED
OCT 11 1942

CHARLES E. NIEMAN
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 269

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,

vs.

**FEDERAL POWER COMMISSION, MONDAKOTA GAS
COMPANY, SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION and NORTH DAKOTA PUBLIC SERV-
ICE COMMISSION,** Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

**BRIEF FOR MONDAKOTA GAS COMPANY
IN OPPOSITION**

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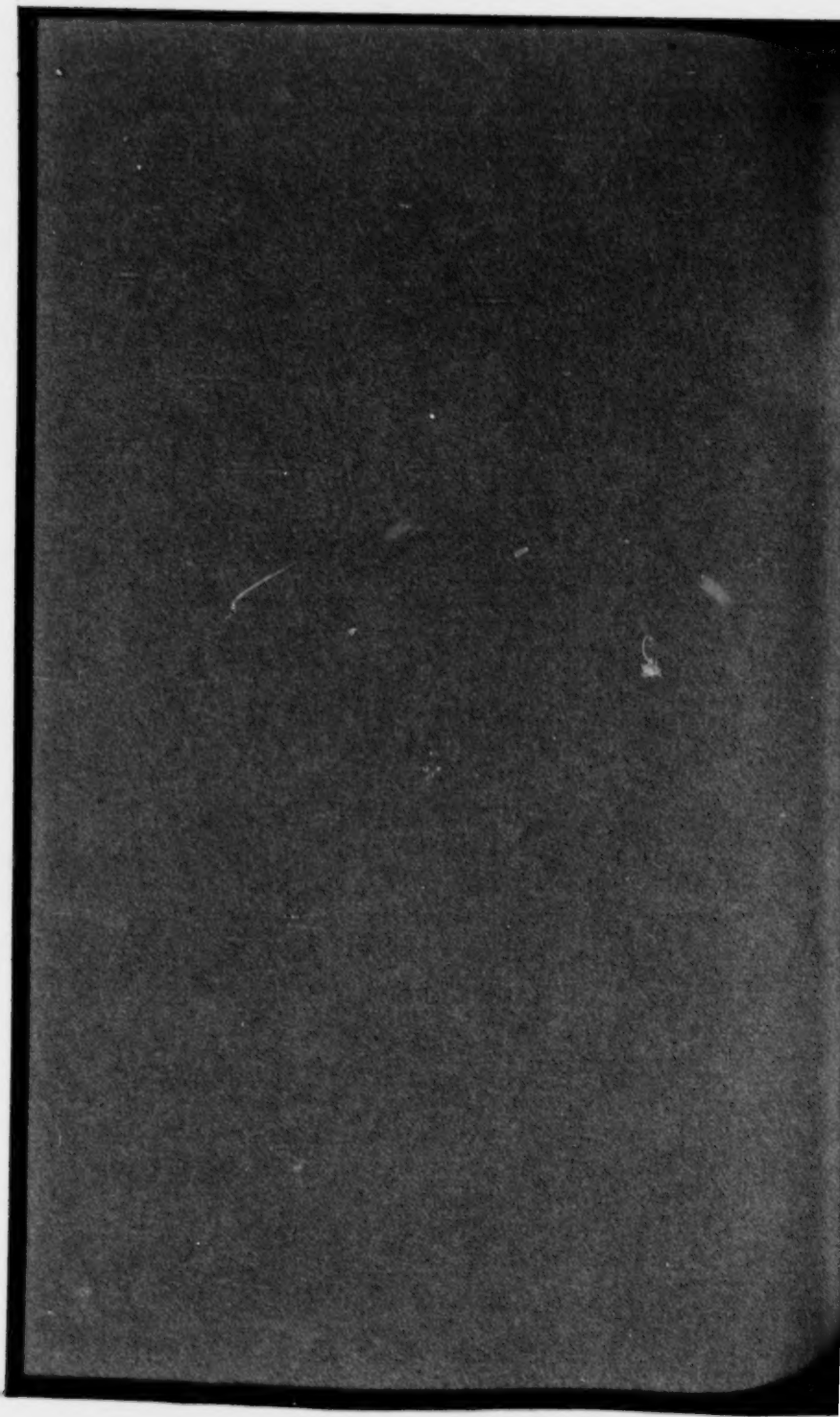
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IN THE
Supreme Court of the United States

October Term, 1948

No. 262

MONTANA-DAKOTA UTILITIES CO.,
Petitioner,
vs.

**FEDERAL POWER COMMISSION, MONDAKOTA GAS
COMPANY, SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION and NORTH DAKOTA PUBLIC SERV-
ICE COMMISSION,** Respondents.

BRIEF FOR MONDAKOTA GAS COMPANY

STATEMENT OF CASE

- (a) This Respondent Adopts the Solicitor General's
Brief in Opposition.**

The respondent, Mondakota Gas Company, concurs in, and adopts as its own, every statement of fact and law contained in the Solicitor General's brief in opposition filed herein.

- (b) Further Statement.**

In view of the full statement of the case contained in the Solicitor General's brief, no further statement is made herein.

ARGUMENT

As appears from the Solicitor General's brief, the decision of the lower court is correct, and there is no conflict of decisions. We feel, however, that we would be remiss in our obligation to this respondent, if we failed to point out the matter of depletion, as hereinafter set forth.

(a) Petitioner Is Depleting This Respondent's Gas Reserves.

In addition to the reasons set forth in the Solicitor General's brief, the petition should be denied to avoid delay and depletion. The lower court, cognizant of petitioner's attempt to delay this decision, effectively blocked its last attempt to obtain further delay in that court (Order, R. Vol. IV, p. 31). That order was entered on issues raised by petitioner's motion for a stay, and this respondent's objections thereto based on resulting delay and consequent depletion and loss to this respondent (R. pp. 28-30).

Petitioner, since 1941, has been, and now is transporting natural gas, which it *produces* in the Baker-Glendive and Bowdoin Gas Fields (Petitioner's Brief, p. 2, lines 24 to 32, p. 3, lines 1-2). This respondent's oil and gas lands and two producing wells are located in the same gas fields. (Opinion C. C. A., Record, Vol. IV, p. 7, lines 14 to 26.)

This respondent cannot market its gas,¹ although it has potential customers therefor.² Petitioner's extraction of gas is resulting in depletion.

¹Mondakota Gas Company's wells have been shut in, because it has no outlet to market its gas except through petitioner's pipe lines. (Opinion, C. C. A., Record, Vol. IV, p. 7, lines 27 to 29. Commission's Opinion and Findings, Record, Vol. I, p. 125, lines 23 to 28, p. 137, lines 21 to 26.)

²Mondakota Gas Company has potential customers to purchase its gas, and can sell same whenever it can transport its gas through petitioner's pipe lines. (Record Vol. IV, p. 126, lines 23 to 28.)

CONCLUSION

The decision below is correct, and there is no conflict of decisions. Delay should be avoided to prevent depletion.

We respectfully submit that an order should be entered herein denying the petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 262

MONTANA-DAKOTA UTILITIES CO., PETITIONER

v. * *

FEDERAL POWER COMMISSION ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

BRIEF FOR FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (R. IV, 5-26) is not yet officially reported. The opinions of the Federal Power Commission (R. I, 119-145, 171-179) are reported at 64 P. U. R. (N. S.) 11, and at 68 P. U. R. (N. S.) 52.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 4, 1948 (R. IV, 26). The petition for a writ of certiorari was filed on September 4, 1948. The jurisdiction

of this Court is invoked under Section 19 (b) of the Natural Gas Act and under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the common carrier obligations, imposed by Section 28 of the Leasing Act of 1920, as amended, as a condition to granting rights-of-way across government-owned lands to natural gas pipe-line companies, may be discharged by the purchase of natural gas.

2. Whether the Federal Power Commission (Commission) may require a natural gas pipe-line company to file prescribed system-wide rates for the interstate transportation of natural gas, coextensive with its common carrier obligations assumed under the Leasing Act, where the company had failed to comply with Section 4 (c) of the Natural Gas Act requiring all rates for such transportation to be filed with the Commission.

3. Whether, in the circumstances here involved, the provisions of the rate schedule prescribed by the Commission were reasonable.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) and of the Leasing Act of 1920, as amended (41 Stat. 437, 449, as amended by 49 Stat. 678, 30 U. S. C. 185) are set forth in the Appendix, *infra*, pp. 17-24.

STATEMENT

Petitioner, Montana-Dakota Utilities Company (Montana-Dakota) in addition to other utility operations, is engaged extensively in the production, interstate transmission, and local distribution of natural gas (R. I, 121). While its natural-gas operations are located in four separate areas, its Baker-Bowdoin system alone transports natural gas and is an integrated interconnected interstate pipe-line system located in the States of Montana, North and South Dakota¹ (R. I, 121). Natural gas, transported in this system, comes from the Bowdoin field in Montana, and from the Baker field in Montana and North Dakota. The system extends from points in the vicinity of Malta, Montana, and Williston, North Dakota, on the north, to Rapid City, South Dakota, on the south, and from Miles City, Montana, on the west, to Bismarck, North Dakota, on the east. The natural gas transported through such system lines is subsequently distributed through local systems in 19 communities in Montana, 17 communities in North Dakota, and 11 communities in South Dakota. (R. I, 121, Pet. Br. App. opp. p. 20.)²

¹ Petitioner is admittedly a natural-gas company within the meaning of the Natural Gas Act, since it is "engaged in the transportation of natural gas in interstate commerce." It holds a certificate of public convenience and necessity issued by the Commission on April 6, 1943. 3 F. P. C. 968.

² Petitioner makes no sale of natural gas at wholesale to any other gas distributing company.

With the exception of its pipe line extending easterly from Cabin Creek compressor station in Montana to Bismarck, North Dakota,² all of petitioner's transmission pipe lines in the Baker-Bowdoin system were constructed in some part upon rights-of-way across government lands. These grants of rights-of-way were issued by the Secretary of Interior pursuant to Section 28 of the Leasing Act, Appendix, *infra*, pp. 23-24, which permits such grants upon the condition that the pipe lines be constructed, operated and maintained as common carriers. (R. I, 122.)

On October 27, 1933, petitioner filed with the Department of Interior a rate schedule for the interstate transportation of gas through its Black Hills line extending from its Baker, Montana, compressor station to Rapid City, South Dakota (R. I, 123; II, 595). The Department after receiving a complaint and holding a hearing thereon, held on September 10, 1936, that the rates were excessive, unreasonable, and unduly preferential and ordered the filing of reasonable, nondiscriminatory rates (R. II, 537-557). Petitioner on March 2, 1937, filed a new rate schedule

² This line was originally constructed across government-owned lands but no request for right-of-way was filed. Petitioner subsequently removed its pipe line from the government land and relaid it on privately owned right-of-way. The Department of Interior has accepted \$75 in full settlement for the unlawful occupancy of this land. (R. I, 122.)

with the Department of Interior for its Black Hills Line (R. I, 124). On August 24, 1938, petitioner filed with the Commission the two identical rate schedules ("Montana-Dakota Utilities Co. Rate Schedules FPC Nos. 3-G and 4-G") (R. II, 577-587, 595-603) which had heretofore been filed with the Interior Department. According to their terms, these schedules had become effective October 27, 1933, and March 2, 1937, respectively (R. I, 124).

On December 6, 1941, Mondakota Development Company, the predecessor of Mondakota Gas Company (Mondakota) filed a complaint with the Commission (R. I, 2-18) alleging that petitioner's Rate Schedules 3-G and 4-G were "unduly discriminatory, unreasonable and unjust" (R. I, 4) and praying, *inter alia*, that petitioner be required to transport Mondakota's gas without discrimination as required by Section 28 of the Leasing Act and that the Commission determine just and reasonable rates (R. I, 5-6). On July 7, 1942, the Commission, on its own motion instituted a general investigation into petitioner's rates, charges and practices (R. I, 100-103). These proceedings were consolidated for purposes of hearing (R. I, 103).

After a hearing was held, the Commission on March 22, 1946, found the rates and charges fixed by petitioner's Rate Schedules 3-G and 4-G to be unreasonable and unduly discrimina-

tory (R. I, 129-133, 139-140). It further found that petitioner had a statutory obligation under Section 28 of the Leasing Act to maintain and operate all pipe lines in its Baker-Bowdoin system as a common carrier, and that the rates for the interstate transportation there involved must under Section 4 (c) of the Natural Gas Act, Appendix, *infra*, p. 18, be filed with the Commission (R. I, 128-129, 130). But in light of petitioner's "well defined purpose of defeating all attempts to require it to perform its common carrier duty" (R. I, 133-134), the Commission, instead of leaving "the preparation and filing of new rate schedules to be performed by the management," as is usually done (R. I, 133), prescribed the rate together with some related provisions of a new rate schedule for the common carrier transportation of natural gas through petitioner's Baker-Bowdoin system and required petitioner to file such schedule within a reasonable time to supersede Rate Schedules 3-G and 4-G (R. I, 134, 140-141, 141-145).⁴

⁴ The Commission, recognizing that additional provisions were desirable, left to petitioner the discretion to formulate provisions dealing with: "Application for Service (including procedure for periodic revision), Quality of gas, including appropriate provisions regarding (1) extraction of hydrocarbons, and (2) merchantability of the gas, Establishment of Credit, Monthly Statement, Payments, Time of Beginning Service, Suspension of Service, Definition of Operating Division for Determination of Billing Demand, Title to Gas, Force Majeure, Term for which transportation is to be provided" (R. I, 145).

Upon review pursuant to petitioner's application therefor,* the court below rejected the numerous objections raised by petitioner and affirmed the Commission's order (R. IV, 5-26). It held, in so far as here pertinent, that petitioner, having been granted rights-of-way over government land pursuant to Section 28 of the Leasing Act, thereby became a statutory common carrier of natural gas and hence that its rates for such transportation are subject to the Commission's jurisdiction under the Natural Gas Act (R. IV, 11-12). It further held that the Commission properly prescribed rates for petitioner's Baker-Bowdoin system. In this connection, the court pointed out that Section 4 (c) of the Natural Gas Act, required every natural-gas company to file with the Commission schedules of all rates and charges for any transportation subject to the Commission's jurisdiction (R. IV, 16) and commented that petitioner "cannot now add to or subtract from the provisions of the statute nor rely upon its own failure to comply with the pre-

* Petitioner on April 22, 1946, filed a petition for rehearing (R. I, 145-167) which the Commission granted in part (R. I, 168-169). After further hearings, the Commission on January 28, 1947, affirmed its prior order (R. I, 171-180). Upon the partial denial of the application for rehearing, petitioner filed a petition for review in the Court of Appeals for the Eighth Circuit (R. I, 375-385), which stayed these proceedings pending conclusion of the rehearing (R. I, 385-387). When the rehearing was concluded, petitioner on March 24, 1947, filed a second petition for review (R. I, 389-438), which the court below consolidated with the first petition (R. I, 440).

scribed requirements of Congress" (R. IV, 10). The court finally held that the prescribed rates were neither arbitrary nor confiscatory (R. IV, 19-20), and rejected as without substance petitioner's objections to those provisions of the schedule relating to the delivery of gas to the shipper's customers as they needed it and the requirement that such transportation service should be equal, in all ways, to petitioner's firm deliveries (R. IV, 21).

ARGUMENT

The Commission order here involved requires petitioner, a statutory common carrier under Section 28 of the Leasing Act (Appendix, *infra*, pp. 23-24), to file schedules containing prescribed system-wide rates for the common carriage of natural gas in interstate commerce. Petitioner's claim that the order and rates prescribed by the Commission are invalid is predicated in this Court upon three of the approximately 30 grounds urged below in support of that contention. The rejection by the court below of these grounds, together with the others there advanced, was clearly correct, and further review by this Court is unwarranted.

1. Petitioner, relying on *The Pipe Line Cases*, 234 U. S. 548, contends that it is under no obligation to transport the gas of others since, it claims, it discharges its common carrier obligation assumed under Section 28 of the Leasing

Act, by the common purchase of natural gas. These cases, however, hold only that a pipeline company which transports purchased oil over its interstate lines is a common carrier under the Interstate Commerce Act, as amended. A pipe-line company which purchases oil is not thereby relieved of common carrier obligation; instead, it becomes obligated to act as a common carrier, to transport the oil of others and to file schedules of rates and charges for such transportation. 234 U. S. at 558, 561.* *Valvoline Oil Company v. United States*, 308 U. S. 141; *Champlin Rfg. Co. v. United States*, 329 U. S. 29. Far from supporting petitioner's position, *The Pipe Line Cases* make it clear that common carrier obligations may not be discharged by common purchases.

Read in the light of *The Pipe Line Cases*, Section 28 of the Leasing Act plainly imposed an obligation on petitioner to transport the natural gas of others. Under that Act rights-of-way through public lands for pipe-line purposes may be granted upon the express condition that pipe lines be operated "as common carriers and shall accept, convey, transport, or purchase without discrimination oil or natural gas * * *." See Appendix, p. 23, *infra*. The Department of Interior so read Section 28 in its Order of September 10, 1936,

* Indeed, the very purpose of the Hepburn Act of 1906 (34 Stat. 584) involved in *The Pipe Line Cases* was to break the monopoly over the means of transportation, which had been used to force producers to sell oil at terms dictated by pipe-line operators. See 234 U. S. at 559.

dealing with petitioner's obligation under the Act (*supra*, p. 4), where it pointed out that "the grantee of the right of way is bound to operate as a transportation company" (R. II, 556).¹ See S. Rep. No. 1158, 74th Cong., 1st sess., p. 5; 79 Cong. Rec. 12076-7 (letter from Secretary of Interior Ickes recommending 1935 Leasing Act amendments). This accords with the earlier stipulation entered into between the Interior Department and petitioner, in which the latter expressly consented and agreed "that its pipe line shall be constructed, operated, and maintained as a common carrier" (R. III, 653), and also with the endorsements on petitioner's requests for rights-of-way, where petitioner certified that "said pipe line was or is to be constructed, maintained, and operated as a common carrier or a common purchaser of natural gas" (R. III, 655; Tr. 1595-6). See, also, Section 2 (r) of the Standard Gas Lease (R. III, 770, 778; 43 C. F. R. 192.28, p. 424) covering many parcels of land which petitioner operates (Tr. 1834, 1924).

2. Petitioner, claiming that the Commission has only revisory authority over rates and hence is without power to act in the absence of filed

¹ The order concluded by giving petitioner "60 days to submit a new tariff which shall be reasonable and nondiscriminatory, failing which the case will be referred to the Attorney General with a recommendation that he bring suit to cancel the pipe line rights of way heretofore granted [petitioner]" (R. II, 557).

rates, further contends that the Commission exceeded its power in prescribing a system-wide rate for its pipe lines coextensive with its common carrier obligations (Pet. 10-12). But this contention, based solely on petitioner's "own failure to comply with the prescribed requirements of Congress" (R. IV, 16), is likewise without merit. Not only is the Commission authorized by Section 5 (a) of the Natural Gas Act, Appendix *infra*, pp. 20-21, to order that petitioner's filed rates be reduced to just and reasonable levels, but also it is authorized by Section 4 (c) of the Act, Appendix, *infra*, p. 18, to require the filing of all rates for interstate transportation of natural gas,^{*} an obligation which petitioner, although engaged in interstate commerce with a system-wide common carrier obligation, has undeniably failed to discharge. Accordingly, the Commission, at the same time that it ordered petitioner to reduce its filed rates, could have issued an order requiring petitioner to file reasonable rate schedules for the other portions of its common carrier system. In other cases where it issued such orders, the Commission's usual practice has been to leave the prepara-

^{*} By its Order No. 53 of July 5, 1938, 3 Fed. Reg. 1694, the Commission provided that all schedules covering deliveries of natural gas in Montana, North Dakota, and South Dakota and certain other states should be filed not later than August 22, 1938, and by Part 54 of its Provisional Rules of Practice and Regulations (3 Fed. Reg. 1687-1688), it specified the form in which such schedules should be filed.

tion and filing of new rate schedules to the pipe-line company (R. I, 133). These rate schedules, when filed, would be examined by the Commission which would, if necessary, hold further hearings to determine the reasonableness of these proposals, and by further order, require appropriate adjustments. In the instant case, however, since the Commission already had the pertinent rate information before it, and since as the Commission noted, "[petitioner] has persistently maintained a well-defined purpose of defeating all attempts to require it to perform its common carrier duty" (R. I, 133-134),* the Commission, instead of following its usual practice of dividing the proceeding into two steps, undertook to dispose of the entire matter in one order. Accordingly, the Commission ordered petitioner to file schedules of transportation rates for its pipe-line system as required by Section 4 (c) of the Act and prescribed the system-wide rates which it found to be just and reasonable. In these circumstances, such simultaneous disposition of the entire problem confronting the Commission was

*The Commission's opinion continues: "Indeed, counsel's brief for * * * [petitioner] states that: "It has, of course, been apparent throughout this proceeding that the * * * [petitioner] has opposed the granting of a tariff to Mondakota Development Company or to Mondakota Gas Company because of the effect which such a tariff might have on the public utility business of * * * [petitioner]. The pipe lines of * * * [petitioner] were not constructed for the purpose of carrying on a transportation business" (R. I, 134).

entirely practical and lawful. Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 584-585.

3. As to the rate schedule itself, petitioner does not in this Court attack the rates set, nor does it claim that they will not yield a fair return.¹⁰ Instead, it urges that the provisions that common carrier service be in all ways equal to its own firm deliveries (R. I, 143) and that gas be delivered to a shipper's customers as they need it (R. I, 142) impose requirements beyond ordinary common carrier service. The effect of these provisions, petitioner contends, is to require it to perform the public utility service of furnishing shipper's customers with uninterrupted deliveries of gas, and to store shipper's gas if its customers are not ready to take it when it reaches its destination (Pet. 13-14).

(a) These contentions ignore the basic distinction between the transportation of natural gas and the transportation of other commodities by rail, to which petitioner analogizes its carrier obligations (Pet. 14). Natural gas is a fungible commodity and the exact gas tendered by a shipper cannot be followed through the pipe line. Gas storage in the pipe line is an inherent char-

¹⁰ If petitioner fails to earn a reasonable return under the prescribed rates, it is always at liberty to file new schedules subject to the Commission's approval. See Section 4 (e) of the Natural Gas Act, Appendix, *infra*, pp. 19-20.

acteristic of gas transportation, and further, there can be no exact balance between input and deliveries of a pipe line, either as a whole or as regards individual customers. Indeed, petitioner in its own Schedules 3-G and 4-G apparently so understood the character of natural gas transportation, for it there undertook to continue supplying gas to the shipper's customers for 24 hours after the failure of the shipper to supply gas at the point of origin (R. II, 581, 599). In contrast, the Commission did not require petitioner to make delivery beyond the amount of gas received from the shipper for transportation (R. I, 145, Pet. 13). Moreover, not only did the Commission permit petitioner to include in the rate schedule a reasonable charge for "Suspension of Service," to offset the costs of such storage (R. IV, 21), but it also gave petitioner broad leeway in dealing with this problem by permitting petitioner itself to formulate provisions relating to "Time of Beginning Service" and "Term for which Transportation is to be provided" (R. I, 145). *Supra*, p. 6 fn. 4.

(b) In addition, the Commission, in ordering that the common carrier service be equal to petitioner's own firm deliveries, sought to counterbalance petitioner's natural tendency to favor its own consumers. Cf. *United States v. Delaware & Hudson Co.*, 213 U. S. 366; *Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235; *United*

States v. Lehigh Valley R. R. Co., 220 U. S. 257. This requirement is clearly valid, for although petitioner urges that its system has been constructed as a natural gas public utility (Pet. 14), that use of petitioner's system is secondary to its common carrier obligation which it assumed as a condition of the grant of right-of-way through government land for its pipe line. The Commission might therefore have required that the common carrier service not merely be equal to, but indeed be accorded priority over, petitioner's firm deliveries. In these circumstances, requiring that the common carrier service be equal to petitioner's firm deliveries clearly does not give rise to a sound basis for attack on the validity of the Commission's order.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We respectfully submit that the petition for certiorari should be denied.

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APPENDIX

1. The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.*, read as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * *

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all

rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public in-

spection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commis-

sion, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Sec. 19. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court

a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the

Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. The pertinent provision of the Leasing Act of 1920, as amended (41 Stat. 437, 449, as amended by 49 Stat. 678, 30 U. S. C. 185), reads as follows:

Sec. 28. That rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates

and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

